Supreme Court, U.S.
FILED

(1)

No. 98 45

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In The Supreme Court of the United States

OCTOBER TERM 1997

MURRAY ALAN COATS,

Petitioner,

v.

ROBERT SMITH, SUPERINTENDENT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Petitioner sought Habeas review of his State court sentences pursuant to 28 U.S.C. § 2254(d), as amended by the Anti-Terrorism and Effective Death Penalty Act (AEDPA). 28 U.S.C. § 2254(d)(1) provides :

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . .

The question presented in this case is whether a federal habeas court, in reviewing a state court's determination of a mixed question of law and fact, may grant relief only if the state court decision "is so clearly incorrect that it would not be debatable among reasonable jurists?"

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Coats v. Smith, ___ F.3d ___, No. 97-7295 (4th Cir. April 2, 1998) (unpublished) is reprinted in the Appendix A at page 1a (App. A, p. 1a hereafter). The unpublished opinion of the United States District Court for the Eastern District of North Carolina, as well as the Findings and Recommendations of the United States Magistrate Judge are reprinted at App. B, p. 6a and App. C, p. 12a, respectively.

JURISDICTION

The Judgment of the Court of Appeals for the Fourth Circuit was issued on April 2, 1998.

No motion for rehearing was filed. There have been no motions submitted to this Court for extension of time within which to file this Petition for Writ of Certiorari.

Jurisdiction to conduct the requested review is conferred upon this Court by 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

The Sixth Amendment to the United States Constitution provides in relevant part: ". . . the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides in relevant part: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

28 U.S.C. § 2254(d)(1) provides as follows:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

STATEMENT OF THE CASE

Following a jury trial in the Superior Court of Wake County, North Carolina, a "he said, she said" case (App. B, p. 10a), Petitioner Murray Alan Coats was convicted of two counts of First Degree Sexual Offense for forcible fellatio and digital penetration of the prosecutrix's vagina. The State alleged a forcible abduction and sexual assault, whereas the Petitioner described a consensual sexual encounter, and afterwards, a fabricated kidnapping created by the prosecutrix in order to get out of working for her mother at a convenience store.

Petitioner was sentenced to the maximum, consecutive life sentences, in the Superior Court of Wake County, North Carolina. After an unsuccessful direct appeal in the North Carolina Appellate Division, Petitioner filed a state post-conviction proceeding, a Motion for Appropriate Relief, before the Superior Court, seeking a new trial.

While the Motion for Appropriate Relief was pending,

and during the evidentiary hearing held regarding it, counsel for Petitioner uncovered medical records of the prosecutrix which directly impeached and contradicted her trial testimony. These medical records were never provided to the defense prior to trial despite the written request for them and were not obtained by Petitioner's trial counsel even when their existence became known during their cross-examination of the prosecutrix. Nevertheless, the state post-conviction court found that these medical records were not material, using the wrong standard for materiality.[1]

Consequently, the state post-conviction court found neither a violation of *Brady v. Maryland*, 373 U.S. 83 (1963)

---

[1]The state post-conviction court unconstitutionally applied a state newly-discovered evidence standard (more likely than not that the result would have been different) to Petitioner's Federal Constitutional claims rather than the standard required by clearly established law of this Court (reasonable probability that the result would have been different, a standard noted by this Court in *Strickland v. Washington*, 466 U.S. 668, 693 (1984) to be less than more likely than not).

nor a Sixth Amendment violation, eliminating effective assistance of counsel for failure to meet the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984).

Petitioner raised these issues on a Petition for Certiorari before the North Carolina Court of Appeals, the avenue for pursuing relief under state post-conviction procedures. This petition was denied. No appeal or petition to the North Carolina Supreme Court is permitted. N.C. R. App. P. 21(e).

On January 23, 1997, Mr. Coats timely filed his Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254, in the United States District Court for the Eastern District of North Carolina. The habeas issues at the District Court level were prosecutorial misconduct by failure to disclose two medical reports of the prosecutrix, a photograph taken of her shortly after the incident and five statements made to the police but never provided to the defense; ineffectiveness of trial and appellate counsel; and newly discovered evidence.

In reviewing the state post-conviction court's decision, both the United States Magistrate Judge and the District Court applied the standard of review set forth in *Drinkard v. Johnson*, 97 F.3d 751 (5th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1114 (1997).

The magistrate judge found that "the Fifth Circuit in *Drinkard* provides sufficient guidance to assess the reasonableness of [the State post-conviction court's] determinations in the state post-conviction proceedings. There is no need, at this time, for this court to craft an alternative, or more specific analysis of the 'unreasonable application' standard. (App. C, p. 31a)

The District Court agreed. "Though the new reasonableness standard has not been clearly defined in this circuit, the record before this court does not demonstrate that the 'state court decision is so clearly incorrect that it would not be debatable among reasonable jurists.' *Drinkard*, 97 F.3d 751, 769

(5th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1114 (1997)." (App. B., p. 9a)

The Certificate of Appealability preserved all of the habeas issues raised by the Petitioner before the District Court on appeal to the United States Court of Appeals for the Fourth Circuit. The issues surrounding the standard of review were extensively briefed and vigorously argued by both parties. In an unpublished, *per curiam* opinion, the Fourth Circuit held:

> Murray Alan Coats appeals a decision of the district court denying his petition for a writ of habeas corpus, *see* 28 U.S.C.A. § 2254 (West 1994 & Supp. 1997), which challenged his North Carolina convictions. Coats argues that the district court applied an incorrect standard of review in considering the decision of the state postconviction court. Coats further contends that the district court erred in denying him relief on the basis of violations of *Brady v. Maryland*, 373 U.S. 83 (1963), and ineffective assistance of counsel. Finding no error, we affirm.
>
> . . . .
>
> Having had the benefit of oral argument and the parties' briefs, and after careful consideration of the record and the applicable law, we conclude that the district court correctly decided the issues

> before it. Accordingly, we affirm on the reasoning of the district court. *See Coats v. Smith*, No. 5:97-HC-33-H-3 (W.D.N.C. (sic) Aug. 12, 1997).

(App. A, pp. 2a-5a) This Petition followed.

REASONS FOR GRANTING THE PETITION

The Circuits are split as to how to construe the standard of review under the AEDPA and are in conflict with respect to mixed questions of fact and law. *Compare O'Brien v. Dubois*, No. 97-1979 1998 WL 257026 (1st Cir. 1998) *with Drinkard v. Johnson*, 97 F.3d 751 (5th Cir. 1996), *cert. denied*, ___ U.S ___, 117 S.Ct. 1114 (1997); *Neelley v. Nagle*, 138 F.3d 917 (11th Cir. 1998); *Green v. French*, No. 97-25, 1998 WL 237506, (4th Cir. May 13, 1998); *see also*, *Sweeny v. Parke*, 113 F.3d 716 (7th Cir. 1997). This Court should settle the split between the Circuit courts regarding the standard of review to be applied by the District Courts in deciding Federal habeas claims.

The District Court acknowledged at the time of the

decision below that "the new reasonableness standard has not been clearly defined in this circuit." (App. B, p. 9a; App. C, p. 29a) The reason that the definition is in question is that the statute is silent as to this standard of review. Both the District Court and the Magistrate Judge thus adopted the standard enunciated by the Fifth Circuit in *Drinkard v. Johnson*, 97 F.3d 751 (5th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1114 (1997). In *Drinkard,* the standard of review of the state court actions under the AEDPA is held to be an unreasonable application of law to facts

> only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect. In other words, we can grant habeas relief only if a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists.

Id. at 769.

The panel was not unanimous.

> Where a federal court of appeals determines that a state criminal decision is contrary to federal

> law, § 2254(d)(1) does not require the unanimous consent of the federal bench for habeas relief. Indeed, it does not require unanimity among a panel of judges considering the case. The determination of reasonableness must consider only the propriety and correctness of the state court's actions in the context of federal guarantees established by the Supreme Court. If a federal court 'disagrees' with a state court's application of federal law -- if it finds that the state court unreasonably applied the law of the land -- that federal court must grant habeas relief under § 2254(d)(1). It is well established that where state and federal courts disagree about the meaning of federal law, the interpretation of the federal courts must prevail.

Id. at 779. (Garza, J. dissenting) (citation omitted) *Drinkard* has been further commented on by the Fifth Circuit to elucidate "a somewhat hybrid standard of review that is probably most closely akin to the traditional 'clearly erroneous' standard than to any other established standard of review," certainly not plenary review. *Mata v. Johnson*, 99 F.3d 1261, 1267 (1996), *reh'g granted, opinion vacated on other grounds*, 105 F.3d 209 (5th Cir. 1997).

The Fifth Circuit has separated the standards of review contained in § 2254(d)(1) and (2) into three distinct tests, each addressing a distinct category of habeas claims:

> First, the court applies the 'unreasonable' standard contained in § 2254(d)(2) to claims raising only questions of fact, thus affording habeas relief if the state court's determination of facts is 'unreasonable.' Second, the court applies the 'contrary to' standard contained in § 2254(d)(1) to claims raising only questions of law, thus affording habeas relief if the state court's legal analysis is 'contrary to' clearly established federal law. Finally, the court applies the 'unreasonable application' standard contained in § 2254(d)(1) to claims raising mixed questions of law and fact, thus affording habeas relief if the state court's analysis 'involved an unreasonable application of' clearly established federal law.

Green v. Wharton, 1997 WL 404278 (N.D.Ga. July 15, 1997)(Slip Op. at *3).

In *Neelley v. Nagle*, 138 F.3d 917, 924 (11th Cir. 1998) the Eleventh Circuit joined *Drinkard* with an approach which applies the "contrary to" language to issues of law and the "unreasonable application" language to mixed questions of fact

and law. *Cf. Sweeny v. Parke*, 113 F.3d 716, 717-718 (7th Cir. 1997) (applying the bifurcated approach utilized in *Drinkard*, however, not going so far as to hold that the only way a petitioner may obtain relief on mixed questions of facts and law is if every federal judge would rule in his favor); *see also Perez v. Marshall*, 946 F.Supp. 1521, 1532-33 (S.D.Cal. 1996), *appeal denied*, 121 F.3d 716 (9th Cir. 1997)(rejecting an argument that plenary or *de novo* review can be had under any circumstance under the AEDPA).

The Fourth Circuit adopted the *Drinkard* standard in this case, by approving the analysis of the District Court. (App. A, p. 1a) In *Green v. French*, No. 97-25, 1998 WL 237506, *4-5 (4th Cir. May 13, 1998), announced after the decision in this case, the Fourth Circuit first published a printed opinion, consistent with its opinion in this case, adopting the *Drinkard* reasonableness standard.

The use of the word 'unreasonable' in formulating

> this restrictive standard of review implicitly denotes that federal courts must respect all reasonable decisions of state courts. Thus, given the statutory language, and in light of legislative history that unequivocally establishes that Congress meant to enact deferential standards, we hold that an application of law to facts is unreasonable only when it could be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect. In other words, we can grant habeas relief only if a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists.

Id. at *4.

On the other hand, the First Circuit has adopted a totally different standard from that of the Fourth, Fifth, and Eleventh Circuits. *O'Brien v. Dubois*, No. 97-1979 1998 WL 257206 (1st Cir. May 26, 1998). In *Dubois*, the First Circuit recognized the growing conflict:

> Courts and commentators have offered several interpretations of section 2254(d)(1), ranging from utter capitulation--that is, a unitary standard of deference to a state court's reasonable elucidations and applications of constitutional principles in individual cases--to a middle of the road approach--that is a bifurcated standard that

> applies the "contrary to" language to issues of law and the "unreasonable application" language to mixed questions--to a minimalist approach urged by some academics, that clings closely to the past--that is a focus-shifting standard that construes AEDPA as merely directing attention initially to the state court's decision but otherwise leaving the habeas court free to grant the writ whenever it finds the petitioner's claim meritorious.

Id. at *4. (citations omitted)

The First Circuit was "not fully persuaded by any of these multifarious formulations," and instead utilized a two-step analysis:

> First, the habeas court asks whether the Supreme Court has prescribed a rule that governs the petitioner's claim. If so, the habeas court gauges whether the state court decision is 'contrary to' the governing rule. In the absence of a governing rule, the 'contrary to' drops from the equation and the habeas court takes the second step. At this stage, the habeas court determines whether the state court's use of (or failure to use) existing law in deciding petitioner's claim involved an 'unreasonable application' of Supreme Court precedent.

Id. at * 7.

Contrary to the Fourth, Fifth and Eleventh Circuits, the First Circuit does not have its reviewing courts focus on the type of issue before the court, but rather on whether there is clearly established law announced by this Court on the issue. *Id.* at *8. Clearly established law announced by this Court is not, according to the First Circuit, narrowly defined by its specific facts but rather "need not be quite as clear or a precedent as factually specific to rate review under the 'contrary to' clause under section 2254(d)(1)." *Id.* *Cf. Green v. French*, No. 97-25, 1998 WL 237506, *4 (4th Cir. May 13, 1998) (where, the Fourth Circuit holds that for the clearly established test to apply, the factual situation must be identical to the facts presented to this Court in the controlling Opinion).

This test makes sense, because if an Opinion of this Court has prescribed a controlling rule, in a sense that the controlling rule compels a particular outcome, then federal review need only determine whether the state court proceedings

resulted in a decision contrary to that rule. Such a determination by the federal court is plenary, *de novo*.

This interpretation reconciles the AEDPA with its legislative history. Section 2254(d) does not mention questions of law or mixed questions of law and fact. An earlier draft of the AEDPA contained distinct tests for questions of law and mixed questions of law and fact, which Congress did not enact. Although the House originally adopted a provision calling for "arbitrariness" review, 141 Cong. Rec. H1424 (Feb. 8, 1995), it was criticized as excessively deferential, *e.g.*, *id.* at H1426(Rep. Watt), and abandoned when Sen. Hatch drafted § 2254(d). *See* 141 Cong. Rec. S4590-96 (March 24, 1995). Assurances by § 2254(d)'s sponsors that it let federal courts exercise their own judgment were critical in securing its passage. Efforts to adopt legislation requiring deference to state court decisions had failed for thirty years, and only by replacing the substantive deference proposed in the House with procedural deference, was Sen.

Hatch able to muster a thin majority for passage. 141 Cong. Rec. S7850 (June 7, 1995)(vote to strike § 2254(d) fails, 46 to 53).

This legislative history demonstrated that use of the *Drinkard* approach would contravene Congress' intent, and "reads too much into the text of the statute." *Dubois* at *5. Thus, the *Drinkard* interpretation adds an extra layer of analysis to the review of § 2254 petitions that is not contemplated in the text of the statute, and has the potential to unnecessarily complicate a statute that Congress intended to simplify.

The issue regarding the standard of review is an open question, which is decided by the circuits and will arise in each state post-conviction case before the federal court. *See e.g.*, *Williams v. Cain*, 125 F.3d 269 (5th Cir. 1997), *petition for cert. filed* (U.S. June 17, 1998) (No. 97-9567). This is truly a national question.

While this case reflects a national problem under the statute, in this case utilization of the First Circuit's standard of

review would have made significant difference. Employing the First Circuit's standard of review, the Petitioner would have received review under the "contrary to" standard, and would have obtained relief in the lower courts. The law of this Court, *Giglio v. United States*, 405 U.S. 150, 154 (1972) and *Bagley v. United States*, 473 U.S. 667, 676-677 (1985), established that impeaching evidence in a swearing contest, like a "he said, she said" type of case, is evidence which would be relevant to credibility and the jury was entitled to know it. This must be particularly true where, as here, the alleged victim denied to her doctors sexual abuse she would later testify to at trial: digital penetration of her vagina and a bite on the neck. The hospital personnel noted her denial and found no such injuries. Moreover, she claimed injuries to her doctors, bruises, which would have left marks, but which could not be observed by her treating physicians.

Just as in *Giglio*, where a secret deal between the

government and the only witness to the crime was material evidence, the medical records unearthed in this case radically alter the foundation of the prosecutrix's testimony and were thus material. The federal reviewing courts should have applied "contrary to" review of Petitioner's claim by applying case law from this Court specifically intended for application in the instant case rather than the more deferential "unreasonable application" standard.

Combined with the severe, consecutive life sentences imposed on Petitioner, the existence of this Circuit conflict over the standard of review in Habeas cases arising under 28 U.S.C. § 2254(d)(1) warrants plenary review and resolution by this Court. *See* Sup. Ct. R. 10(a).

CONCLUSION

For the foregoing reasons this Petition for the Writ of Certiorari should issue.

Respectfully submitted,

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APPENDIX

Appendix A -- Opinion of the United States Court of Appeals for the Fourth Circuit dated April 2, 1998

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MURRAY ALAN COATS,
Petitioner-Appellant,

v. No. 97-7295

ROBERT SMITH, Superintendent,
Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
Malcolm J. Howard, District Judge.
(CA-97-33-5-3H)

Argued: January 28, 1998

Decided: April 2, 1998

Before RUSSELL,* WIDENER, and WILKINS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: John Kirk Osborn, Chapel Hill, North Carolina, for Appellant. Clarence Joe DelForge, III, Assistant Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellee. **ON BRIEF:** J. Matthew Martin, MARTIN & MARTIN, P.A., Hillsborough, North Carolina, for Appellant. Michael R. Easley, Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellee.

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*Judge Russell heard oral argument in this case but died prior to the time the decision was filed. The decision is filed by a quorum of the panel. 28 U.S.C.A. § 46(d) (West 1993)

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Murray Alan Coats appeals a decision of the district court denying his petition for a writ of habeas corpus, *see* 28 U.S.C.A. § 2254 (West 1994 & Supp. 1997), which challenged his North

Carolina convictions. Coats argues that the district court applied an incorrect standard of review in considering the decision of the state postconviction court. Coats further contends that the district court erred in denying him relief on the basis of violations of *Brady v. Maryland*, 373 U.S. 83 (1963), and ineffective assistance of c[illegible]sel. Finding no error, we affirm.

I.

Coats was convicted in 1989 by a North Carolina court on two counts of first-degree sexual offense, *see* N.C. Gen. Stat. § 14-27.4 (1993), and one count of second-degree kidnapping, *see* N.C. Gen. Stat. § 14-39 (1993). Coats' victim testified that she was working at a convenience store when Coats forced her at gunpoint to leave the store and accompany him to a barn where he forced her to remove her clothes and perform oral sex on him for an hour or more. She also testified that Coats penetrated her vagina with his finger. Coats' convictions were affirmed by the North Carolina Court of Appeals, and the North

Carolina Supreme Court denied discretionary review.

In 1993, having obtained new counsel, Coats filed a motion for appropriate relief in the Wake County Superior Court asserting that his trial counsel was constitutionally ineffective, that Coats had discovered evidence having a direct and material bearing upon his innocence, and that the prosecutor had engaged in misconduct by failing to disclose the evidence. An evidentiary hearing was held in December 1994, after which the state-court judge denied Coats' motion, finding in pertinent part that trial counsel was not constitutionally ineffective, that the newly discovered evidence was not material, and that the prosecutor had not engaged in misconduct. The North Carolina Court of Appeals then denied certiorari. Coats subsequently filed this petition for a writ of habeas corpus in January 1997, and the district court granted summary judgment against him.

II.

Having had the benefit of oral argument and the parties'

briefs, and after careful consideration of the record and the applicable law, we conclude that the district court correctly decided the issues before it. Accordingly, we affirm on the reasoning of the district court. *See Coats v. Smith*, No. 5:97-HC-33-H-3 (W.D.N.C. Aug. 12, 1997).

AFFIRMED

Appendix B -- Order of the United States District Court for the Eastern District of North Carolina dated August 11, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:97-HC-33-H-3

MURRAY ALAN COATS, Petitioner,	)	
v.	)	ORDER
ROBERT SMITH, Supt., Respondent.	)	

This matter is before the court upon respondent's motion for summary judgment. On June 6, Magistrate Judge Wallace W. Dixon filed a Memorandum and Recommendation ("M&R") in which he recommended that the respondent's motion be granted. On June 19, 1997, petitioner filed objections to the recommendation of the magistrate judge. This matter is ripe for ruling.

Petitioner was convicted on April 14, 1989, of two counts of first degree sexual offense and one count of second degree kidnaping in the Superior Court of Wake County, North Carolina. Petitioner was sentenced to two consecutive life terms, and a concurrent 30-year term of incarceration. Appropriate relief was denied by the North Carolina Court of Appeals and the North Carolina Supreme Court denied review. Following the exhaustion of the appeal process, petitioner sought post-conviction relief in the Superior Court of Wake County. An evidentiary hearing was conducted before Judge Robert H. Hobgood and an order containing a lengthy findings of fact and conclusions of law was filed denying petitioner's motion for appropriate relief. This court will conduct a de novo review of the applicable issues and especially in light of the objections raised by petitioner to the M&R.

Petitioner has divided his claim for relief into three broad areas of (1) prosecutorial misconduct, (2) ineffective assistance

of counsel, and (3) newly-discovered evidence. The focus of the Mr. Coats' petition is that the findings of fact and conclusions of law of Wake County Superior Court Judge Robert H. Hobgood were not reasonable. Mr. Coats' objection to the M&R is a broad based objection to all of the M&R.

Magistrate Judge Dixon had delved into a well researched summation of the current standards for Habeas Corpus review. Specifically, Magistrate Judge Dixon discussed in his M&R the effects of The Antiterrorism and Effective Death Penalty Act of 1996 "(AEDPA)", Pub. L. No. 104-132, 110 Stat. 1214 (1996) signed into law on April 24, 1996, on review of 28 U.S.C. § 2254 petitions by federal courts.

Magistrate Judge Dixon states that "[t]his court . . . does not sit as a general court of review for the state court post-conviction proceedings; and it is not its intention to review each such contention of error." M&R P. 15. The M&R correctly states that one of the major changes brought forth by the AEDPA

is the standard of review of state court matters. Federal court's are now required to give great deference to the findings of state courts. Federal courts are to grant this deference and only disturb state court findings if they are "unreasonable" in light of "clearly established Federal law" or a decision was made "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d).

Magistrate Judge Dixon has thoroughly addressed all of the petitioner's claims for relief. Magistrate Judge Dixon recommends that summary judgment be granted on all of the claims before the court. The magistrate judge had delved into a 48-page M&R of which this court is in agreement.

Though the new reasonableness standard has not been clearly defined in this circuit, the record before this court does not demonstrate that the "state court decision is so clearly incorrect that it would not be debatable among reasonable jurists." Drinkard v. Johnson, 97 F.3d 751, 769 (5th Cir. 1996), cert. denied, 117 S. Ct. 1114 (1997). This is the prevailing

standard which requires deference to the state judicial system. Though this case is a standard "she said, he said" type case, this court conforms with the prevailing standard and acknowledges that it is unable to realize the demeanor and assess the credibility of the witnesses. The appellant has had the credibility of witnesses and evidence scrutinized by a jury of his peers and Judge Hobgood. This court would be hard pressed to find that with this second review of the evidence, that petitioner was treated with unreasonableness.

Accordingly, the court hereby adopts the recommendation of the magistrate judge as its own; and for the reasons set forth in the M&R, the motion of the respondent for summary judgment is GRANTED. This action is therefore DISMISSED and the clerk is directed to close this case.

This 11th day of August, 1997.

MALCOLM J. HOWARD
United States District Judge

At Greenville, NC
#14

Appendix C -- Memorandum and Recommendation of the United States Magistrate Judge for the Eastern District of North Carolina dated June 6, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:97-HC-33-H

MURRAY ALAN COATS, Petitioner,	)	
v.	)	MEMORANDUM AND RECOMMENDATION
ROBERT SMITH, Supt., Respondent.	)	

Murray Alan Coats, a prisoner of the State of North Carolina, has petitioned this court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent has moved for summary judgment, Petitioner has responded, and Respondent has replied. The matter is now ripe for disposition.

Petitioner was convicted on April 14, 1989, of two counts of first degree sexual offense and one count of second degree kidnapping in the Superior Court of Wake County, the

Honorable Orlando Hudson, Judge Presiding. He received a sentence of two consecutive life terms for the sexual offense counts, and a concurrent 30-year term of imprisonment on the kidnapping charge. During the pendency of his appeal, Petitioner, through counsel, filed a motion for appropriate relief with the North Carolina Court of Appeals. The Court of Appeals denied the motion and found no error in Petitioner's trial. The North Carolina Supreme Court then denied discretionary review. State v. Coats, 100 N.C. App. 455, 397 S.E.2d 512 (1990), disc. review denied, 328 N.C. 573, 403 S.E.2d 515 (1991). Petitioner was represented at both trial and appeal by George M. Anderson and Richard W. Rutherford of the Wake County Bar.

Petitioner subsequently obtained new counsel, and on July 21, 1993, filed a motion for appropriate relief in the Wake County Superior Court. An evidentiary hearing was held on December 15, 1994, before the Honorable Robert H. Hobgood. Judge Hobgood later issued a written order containing findings

of fact and conclusions of law which denied Petitioner's motion. The North Carolina Court of Appeals denied certiorari on July 30, 1996, and this federal petition was filed January 23, 1997.

Factual Background

The State's trial evidence tended to show that at approximately 7:15 o'clock a.m. on November 5, 1988, Kimberly Lynn Hilton arrived for work at the Star Flite Gas Station on North Boulevard in Raleigh. Her arrival was approximately 15 minutes later than the store was supposed to open on a Saturday morning. (Trial transcript at 11)(hereafter TR). At the time of the events in question, Ms. Hilton was a student at N.C. State University, and she lived with her mother, Virginia Hilton, who was the manager of the store. Ms. Hilton and her mother had an argument or discussion that morning over the fact that she was going to be late for work. (TR. at 65).

Petitioner patronized this gas station and stopped in

shortly after 7:30 o'clock a.m. to make a purchase. However, according to Ms. Hilton, Petitioner returned to the store at approximately 9:00 o'clock a.m. the same morning and found her alone in the store. He walked behind the counter, produced a gun, pointed it at her face, grabbed her by the hair, and pulled her out of the store.

Petitioner then placed Ms. Hilton in the passenger seat of a pickup truck and locked the door. He drove her from the gas station while holding the gun at her left leg. He drove to a wooded area, stopped near an old tobacco barn, and forced Ms. Hilton inside. He ordered her to disrobe and forced her to perform oral sex on him. According to Ms. Hilton, Petitioner retained possession of the gun, at one point holding it against her head and stating, "[Y]ou can do better than that." Petitioner had her change positions several times, and later directed her to get on a platform on her hand and knees. He then penetrated her vagina with his finger. After this attack, Petitioner commenced

a "rambling monologue" about his use of cocaine the previous night, his knowledge of Ms. Hilton's family, and his difficulties with his present girlfriend.

Petitioner testified in his own defense. He contended that he had frequented the Star Flite on a number of occasions going to and from work, that he had struck up "casual conversations" with Ms. Hilton, and that the two "tended to flirt a little bit with each other." (TR. at 281). This period of casual conversation and flirtation took place over a six to seven-month period prior to the November 5 incident. (TR. at 282).

On the night of November 4, several people came to Petitioner's residence for a party. At this party, Petitioner drank alcohol and used some cocaine until approximately 1:00 o'clock a.m. Petitioner and some of his guests then played cards and backgammon until 5:00 o'clock a.m. Petitioner was scheduled to work on Saturday morning and decided that he would not try to go to sleep. (TR. at 287). At approximately 6:00 o'clock a.m.,

Petitioner left to take two of his guests to their home. En route, they stopped to look at some motorcycles.

On his way into work, Petitioner stopped at the Star Flite and struck up a conversation with Ms. Hilton. Petitioner testified that Ms. Hilton did not have her usual cheerful demeanor when he had entered the store. When he asked her about this, she told him that she had a fight with her mother over being late. According to Petitioner, Ms. Hilton said that she was tired of working there. Petitioner responded by remarking that he, too, did not feel like going to work (at ASI Sign Company), and that he had been up all night. Petitioner then made the remark, "why don't we both take off work and let everybody else handle it?" (TR. at 294). Ms. Hilton responded that it sounded like a good idea. Petitioner said, however, that he could not because he had "about fifteen people waiting up at work right now for me to go over there and tell them what to do." (TR. at 294-95). Petitioner's employer, Don Beaver, testified that on November 5

ASI Sign Company had a "critical" job for an important customer that had to be finished by Monday. Mr. Beaver further testified that both he and Petitioner, in his capacity as production manager, had stressed to all of the employees about the importance of being at work that particular Saturday. (TR. at 182-83).

Petitioner then left the Star Flite and headed towards work. He experienced car problems and decided that he would not go into work after all. He was able to get his car back to his residence and exchanged it for his live-in girlfriend's pickup truck. Shortly after making this exchange, Petitioner decided to return to the Star Flite to see if Ms. Hilton still wanted to take the day off. She agreed to do so and accompanied him willingly. As they left the store, Petitioner asked if she was going to lock the door and she responded that she was not. When Petitioner expressed concern, Ms. Hilton responded that she had a "plan," that Petitioner should not worry about it, and that she would

"cover" for him. (TR. at 306). Ms. Hilton then got into the passenger side of the truck, and Petitioner closed it after her.

Petitioner's gun was in the truck in the crack of the bench seat. (TR. at 311). Ms. Hilton saw it and told Petitioner that she did not like guns. He told her that the clip was in the glove compartment. He took the gun from the seat and placed it in the glove compartment as well. (TR. at 311). He denied ever threatening her with the gun, or even taking it out of the glove compartment afterward.

After riding around, Petitioner and Ms. Hilton came by the tobacco barn in question. He asked her if she would like to explore the barn and she agreed. Shortly after entering the barn, the two embraced and began a sexual encounter that included Ms. Hilton voluntarily agreeing to perform fellatio. At the conclusion of their sexual encounter, they talked; and Ms. Hilton told Petitioner that she was going to tell her mother that she had been abducted from the store so that she would no longer have

to work there. She assured Petitioner that she would not implicate him in the story that she was going to fabricate. Petitioner returned to his truck, and found that the battery was dead as he had left his emergency flashers on. A passerby stopped and offered to get some jumper cables. Petitioner returned to the barn and told Ms. Hilton of this development. She responded that she might leave in a few minutes. (TR. at 357-58). With the assistance of the passerby, Petitioner got his truck started. He turned around and passed a deputy sheriff's car with Ms. Hilton inside. He then proceeded home. (TR. at 361).

Claims for Habeas Relief

Petitioner divides his claims for relief into three broad areas, designated I-III. Category I covers allegations of prosecutorial misconduct. He subdivides these allegations into subcontention A, claiming a violation of the prosecution's duty of disclosing exculpatory information under Brady v. Maryland,

373 U.S. 83 (1963), and subcontention B, contending that the prosecution failed to use due diligence to locate and provide certain evidence, including medical records.

Category II presents claims of ineffective assistance of counsel, both at trial and on appeal. Petitioner claims that his attorneys' trial representation was ineffective in that: 1) trial counsel submitted an "ineffective" discovery request to the prosecution; 2) counsel failed to move to compel the production of evidence, including photographs and medical records, after Ms. Hilton had testified; 3) counsel failed to locate and produce witnesses who could have refuted Ms. Hilton's testimony, impeached her credibility, and corroborated his testimony; 4) counsel failed to prepare those defense witnesses that were called for the "blistering" cross examination regarding conflicting stories told by Petitioner (this claim has been withdrawn), nor did they call as witnesses the health care providers who had observed Ms. Hilton subsequent to the alleged abduction; and 5)

counsel failed to adequately prepare Petitioner for his testimony, in that they allowed him to testify on cross-examination that he had been convicted of the offense of communicating a threat, when in fact that charge had been dismissed.

Petitioner also contends that his counsel rendered ineffective assistance on appeal. As grounds for this claim, he asserts that while the appeal was pending, an investigator observed a statement by Shannon Simmons (Brown) in the file of one of the investigating detectives. Petitioner argues that instead of following up this statement with further investigation, counsel "[i]mmediately, almost reflexively" filed a motion for appropriate relief with the Court of Appeals. Petitioner further argues that his ineffective assistance claims should also be considered for their cumulative effect.

Petitioner's third category of claims for relief consists of claims of newly-discovered evidence which could not have been discovered with due diligence at the time of trial. This category

consists of the testimony of Don Phillips, an alleged eyewitness who observed Ms. Hilton enter the truck with Petitioner; medical records and a photograph of Ms. Hilton which would show that she did not suffer physical injuries consistent with her version of the facts at trial; and new evidence of a long pattern of deceptive conduct by Ms. Hilton.

Standards for Habeas Corpus Review

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996) was signed into law April 24, 1996. The AEDPA significantly amended the federal habeas corpus statutes. See Moore v. Calderon, 108 F.3d 261, 263 (9th Cir. 1997)(AEDPA worked substantial changes to the law of habeas corpus), petition for cert. filed, 65 U.S.L.W. 3728 (April 18, 1997). Since the petition sub judice was filed after the date the AEDPA was signed into law, its provision govern this court's review of the legal rulings of the

state courts. Dukes v. Hunt, 952 F. Supp. 276, 279 (E.D.N.C. 1996).

One of the major changes wrought by the AEDPA was the amendment of 28 U.S.C. § 2254(d) to set forth the standards of review to be employed by federal courts. That statute now provides that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (1996). In addition, § 2254(e) now provides that:

> (1) In a proceeding instituted by an application

for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that -

(A) the claim relies on -

(i) a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e) (1996).

Respondent argues that these new standards govern this

court's determination and that, given Judge Hobgood's findings of fact and conclusions of law in the state proceedings, Petitioner is not entitled to the writ. Petitioner contends that while § 2254(d), as amended, requires procedural deference to state court decisions, it does not require federal courts to forego their own judgment as to the meaning of federal law. Petitioner further argues that the "contrary to law" standard of § 2254(d), when compared with analogous statutes, rules, and doctrines, allows for plenary review of state court determinations.

The courts that have considered the impact of the amendments to § 2254(d) are in apparent agreement that the new standard is more deferential to the factual and legal determinations of state courts. See Brown v. Cain, 104 F.3d 744, 749 (5th Cir.)(§ 2254(d) clarifies the level of deference that a federal court must give to prior judgments of a state court on the merits of habeas petitioner's claims), cert. denied, 117 S. Ct. 1489 (1997); Gomez v. Acevedo, 106 F.3d 192, 199 (7th Cir.)(§

2254(d) requires only deferential review for reasonableness), petition for cert. filed, No. 96-8978 (May 5, 1997); Berryman v. Morton, 100 F.3d 1089, 1103 (3rd Cir. 1996)(noting general agreement that AEDPA changes standard of review and assuming that it establishes a more deferential test); see also Archie v. Hobbs, 954 F. Supp. 1149, 1153-54 (W.D. Va. 1997)(noting that prior to AEDPA, broad conclusions by state court regarding the substantive merit of petitioner's argument would be entitled to little deference from federal court, but finding that AEDPA amendments now govern and under these standards, findings of state court were not contrary to, nor unreasonable application of, clearly established federal law).

In Drinkard v. Johnson, 97 F.3d 751 (5th Cir. 1996), cert. denied, 117 S. Ct. 1114 (1997), the Fifth Circuit analyzed § 2254 by beginning with the proposition that judicial decisions revolve around three types of questions, viz. questions of law, questions of fact, and mixed questions of law and fact (questions requiring

the application of law to the facts). 97 F.3d at 767. The Drinkard court observed that § 2254(d)(2) supplied the applicable standard of review for determinations of questions of fact, while subsection (d)(1) provided the standard for addressing both questions of law and mixed questions of law and fact. Id. The court went on to state that:

> [W]hen reviewing a mixed question of law and fact, a federal court may grant habeas relief only if it determines that the state court decision rested on "an unreasonable application of [ ] clearly established Federal law, as determined by the Supreme Court," to the facts of the case. We read the first clause, on the other hand, as referring to questions of law. When reviewing a purely legal question, a federal court may grant habeas relief only if it determines that a state court's decision rested on a legal determination that was "contrary to . . . clearly established Federal law, as determined by the Supreme Court." Thus, the standard of review will vary depending on whether the question before the court is one of fact, one of law, or mixed.

Id. at 768.

This court finds this portion of Drinkard's analysis as to the breakdown of the § 2254(d) standards to be correct.

Petitioner's claims of Brady violations and ineffective assistance of counsel are mixed questions of law and fact. Strickland v. Washington, 466 U.S. 668, 698 (1984)(ineffective assistance); Brown v. Cain, 104 F.3d at 750 (Brady). Those claims are now reviewed under the "unreasonable application" test of § 2254(d)(1).

In considering the question of when a state court's decision could be considered "unreasonable," the en banc Seventh Circuit in Lindh v. Murphy, 96 F.3d 856, 871 (7th Cir. 1996), cert. granted in part, 117 S. Ct. 726 (1997), said:

> that question lacks an abstract answer, just as courts have been unable to give precise content to phrases such as "abuse of discretion." . . . For current purposes it is enough to say that when the constitutional question is a matter of degree, rather than of concrete entitlements, a "reasonable" decision by the state court must be honored. By posing the question whether the state court's treatment was "unreasonable," § 2254(d)(1) requires federal courts to take into account the care with which the state court considered the subject.

Questions of degree - like questions about the

> proper use of "discretion" - lack answers to which the labels "right" and "wrong" may be attached. When the subject is painted in shades of gray, rather than in contrasting colors, a responsible, thoughtful answer reached after a full opportunity to litigate is adequate to support the judgment . . . . The Supreme Court of the United States sets the bounds of what is "reasonable"; a state decision within those limits must be respected - not because it is right, or because federal courts must abandon their independent decisionmaking, but because the grave remedy of upsetting a judgment entered by another judicial system after full litigation is reserved for grave decisions. That is the principal change effected by § 2254(d)(1).

In Drinkard, the Fifth Circuit approached the question of defining the "unreasonable application" standard by noting that it:

> must mean more than that a federal court may grant habeas relief based on its simple disagreement with the state court decision; this would amount to nothing more than a de novo review. The use of the word "unreasonable" in formulating this restrictive standard of review implicitly denotes that federal courts must respect all reasonable decisions of state courts. Thus, given statutory language, and in the light of legislative history that unequivocally establishes that Congress meant to enact deferential

> standards, we hold that an application of law to facts is unreasonable only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect. In other words, we can grant habeas relief only if a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists.

97 F.3d at 768-69. Furthermore, § 2254(d) limits the parameters of a federal court's analysis of a state court's reasonableness to federal law as defined by the Supreme Court. Mere disagreement with circuit precedent will not suffice. Moore v. Calderon, 108 F.3d at 264; Bocain v. Godinez, 101 F.3d 465, 471 (7th Cir. 1996). The court finds that, for the purposes here, the reasoning expressed by the Seventh Circuit in Lindh, and the Fifth Circuit in Drinkard, provides sufficient guidance to assess the reasonableness of Judge Hobgood's determinations in the state post-conviction proceedings. There is no need, at this time, for this court to craft an alternative, or more specific, analysis of the "unreasonable application" standard.

The court takes this opportunity to make the following

observations concerning its review of the state court proceedings. As the Fifth Circuit observed in Hernandez v. Johnson, 108 F.3d 554, 558 (5th Cir. 1997), the AEDPA "shift[s] the focus of hearings to the state courts where it belongs." In determining the reasonableness of the relevant findings of fact and conclusions of law, this court remains cognizant that, in the state proceedings, Petitioner bore the burden of proving every fact essential to his motion. N.C. GEN. STAT. § 15A-1420(c)(5).

Petitioner challenges a number of Judge Hobgood's findings of fact and legal conclusions, and Respondent has addressed these challenges. This court, however, does not sit as a general court of review for the state court post-conviction proceedings; and it is not its intention to review each such contention of error. Instead, this recommendation will focus on the specific arguments made in support of habeas corpus relief, as violations of federal constitutional rights. The state court findings will be reviewed only for those areas that are deemed

material to the disposition of the issues that are properly the subject of this court's inquiry.

Prosecutorial Misconduct

Petitioner's trial counsel submitted a request for discovery to the prosecutor during the state criminal proceedings. No medical records or photographs were produced in response to this request. Petitioner contends that there were both medical records of Kim Hilton, as well as a photograph taken by her mother the night after the alleged assault. Petitioner also faults the prosecution for failing to learn of and obtain the medical records as a lack of due diligence on its part.

It is argued that these materials would constitute exculpatory evidence, namely that Kim Hilton did not display physical injuries or symptoms that were consistent with her version of having undergone a forcible abduction and sexual assault. Kim Hilton went to Raleigh Community Hospital on

November 7, two days after the assault. Petitioner contends that while she complained at the hospital of bruising on her knees, and testified at trial that she had been dragged by her hair uphill to the tobacco barn through briars, no bruising or lacerations were observed. (Ex. 4). The significance of this bruising is that Ms. Hilton testified that she was required to stay on her knees for an extended period of time while being forced to perform oral sex. Petitioner contends that the photograph taken by Ms. Hilton's mother does not show that her knees were bruised.

The evidence also showed that Virginia Hilton called the N.C. State University infirmary on the day of the assault. An infirmary nurse prepared a written entry concerning this call which states that an appointment was made for Kim to come in, but that she failed to make it because she was too emotionally drained. This entry also reflects that Kim was concerned over a test and term paper that were due next week. (Ex. 4). Petitioner contends that this could also be used as another basis to impeach

her testimony.

Under Brady, the prosecution must disclose "favorable evidence that is of material import in the determination of guilt or punishment." United States v. Hoyte, 51 F.3d 1239, 1242 (4th Cir.)(emphasis in original), cert. denied, 116 S. Ct. 346 (1995); Love v. Johnson, 57 F.3d 1305, 1313 (4th Cir. 1995); see also Holdren v. Legursky, 16 F.3d 57, 60 (4th Cir.)(government has a duty to disclose material exculpatory evidence to the defendant, and the good faith or bad faith of the government in failing to do so is irrelevant), cert. denied, 513 U.S. 831 (1994). A constitutional error results from the government's suppression of favorable evidence "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Kyles v. Whitley, 115 S. Ct. 1555, 1565 (1995)(quoting United States v. Bagley, 473 U.S. 667, 682 (1985)).

In Kyles, the Supreme Court reviewed four aspects of the

"materiality" ground for the Brady/Bagley analysis. First, materiality does not require a showing that the disclosure would have ultimately led to the defendant's acquittal. Second, the defendant (Petitioner here) does not have to show that, after discounting inculpatory evidence in light of the undisclosed exculpatory evidence, the evidence would have been insufficient to convict. Third, once a constitutional error has been determined to exist, there is no need to conduct an additional harmless error review. Fourth, materiality of the suppressed evidence must be considered collectively, not item-by-item. 115 S. Ct. at 1566-67.

The Kyles Court also noted that while the definition of materiality in terms of cumulative effect vested the prosecution with a degree of discretion, it also imposed a corresponding burden; and the prosecution must bear the responsibility of gauging the effect of all non-disclosed evidence and making disclosure when the point of "reasonable probability" [that the

result would different] is reached. This burden imposes a duty on the individual prosecutor "to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." Id. at 1567. Kyles rejected an argument that the prosecution should not be held accountable under Brady and Bagley for evidence that was known to the investigating officers, but was not disclosed to the prosecutor. Id. at 1568.

At the state evidentiary hearing, Frank Jackson, the prosecutor in Petitioner's case, testified that he had an "open file" discovery policy. (Post-conviction evidentiary hearing transcript, Vol. 1 at 213)(hereafter TH). When questioned about medical records of Kim Hilton, he stated that he did not ask her about any medical examination, and that he saw no need to do so since the perpetrator's identity was known and the only issue involved was that of whether the sex was consensual. (TH., Vol. 1 at 221-22). He acknowledged that he had seen a copy of the report from Raleigh Community Hospital at some point. He also testified

that if it had been in his file, it would have been disclosed to defense counsel. (TH., Vol. 1 at 223). He did not recall ever seeing the report from the N.C. State University infirmary concerning the telephone call of Virginia Hilton and the conversation with Kim. He did state that he did not feel that it was a requirement of due diligence that he determine whether Ms. Hilton had seen doctors at the infirmary, and that it was not necessary to the prosecution of Petitioner. (TH. at 225-26).

Detective J. K. Harrison testified concerning the photograph of Kim Hilton. Det. Harrison stated that the photograph was taken on November 5, 1988, by Virginia Hilton and that he obtained the picture from Virginia Hilton. He further testified that his normal policy is to make a copy of everything and turn it over to the prosecution. He specifically stated that the pictures were shown to Mr. Jackson. Harrison could not recall, however, whether a copy of the picture was made. (TH., Vol. 2 at 40).

The court notes that there was some discrepancy between the testimony of Frank Jackson and Det. Harrison concerning making disclosure to defense counsel. Jackson testified that if defense attorneys request certain materials, such as taped statements, he refers them to the investigating officers, and the Raleigh Police Department has direct orders to provide these materials. (TH. Vol. 1 at 215). Harrison states, however, that he is rarely contacted by defense attorneys, and that when he is, he tells them to contact the district attorney. (TH., Vol. 2 at 43).

Judge Hobgood made the findings which follow concerning the photograph and medical records.

> At trial, Virginia Hilton, the victim's mother testified that the victim's knees were red after the assault. The defendant testified that the victim complained of discomfort to her knees during the commission of the acts that constituted the offense.
>
> The photograph is not of a quality where - by any detail of the victim's legs or injuries thereto may be ascertained.
>
> At best, the photograph would merely contradict,

> impeach, or discredit a former witness and is not such that had it been introduced into evidence, a different result would have been reached at trial.
>
> Having reviewed the medical records, the court finds that the records from North Carolina State University infirmary and from Raleigh Community Hospital, if anything, merely tends to impeach or contradict a former witness, and are not such that a different result would probably be reached at trial. The medical records, as a whole, corroborate the testimony of the victim.
>
> Because of the acts alleged to have been committed by the defendant, the defendant's trial counsel did not feel in their professional judgment that any medical reports would be important.
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> Based on the review of the testimony of the victim at trial, the court finds that the acts committed against her are not such that would be likely to cause physical injuries to her that would have been revealed through a physical examination.

(Ex. 1 at 7-8).

Several of Judge Hobgood's findings state that the evidence "at most" would have served only to impeach or contradict a former witness, namely the alleged victim Kim

Hilton. These references are apparently based on state law standards concerning the grant of a new trial based on newly discovered evidence, State v. Beaver, 291 N.C. 137, 229 S.E.2d 179 (1976); State v. Newell, 82 N.C. App. 707, 348 S.E.2d 158 (1986), which was argued by the prosecution at the conclusion of the evidentiary hearing. (TH., Vol. 2 at 127). Of course, the potential impeachment value of the evidence here is at the heart of Petitioner's Brady argument. Nevertheless, the court finds that several of Judge Hobgood's findings are sufficient, when viewed under the newly-applicable standards, to resolve the question of materiality for Brady purposes.

To begin with, the finding that the photograph was of insufficient quality to reveal details concerning the condition of Kim Hilton's legs is a finding of fact, presumed correct at this point. The photograph has not been made part of the evidentiary record, and certainly this court cannot say that such a finding is an unreasonable one. In addition, Virginia Hilton, who took the

photograph, offered testimony that Kim's knees were "red" immediately after the incident. Petitioner also testified at trial that Kim had been uncomfortable on her knees. (TR. at 340).

The court also finds that Judge Hobgood's determination that the medical records, on the whole, tended to corroborate Kim Hilton's testimony is also not unreasonable under the applicable standards. The court has reviewed both records and finds that in both, Kim Hilton consistently told of being abducted at gunpoint and forced to perform oral sex. The Raleigh Community Hospital notes contain a final diagnosis of "sexual assault."

Petitioner argues that the N.C. State University infirmary report refers to an upcoming test and term paper, which could also have been used to impeach Ms. Hilton. That same report states that she is afraid of AIDS and that she did not want others on campus to know of this event. It recounted that she felt "dirty" and "emotionally drained" and dreaded the next month

which would be important for school. The court notes that since this incident occurred in early November, the next month would be the last third of the semester, including final exams.

Perhaps most important for Brady materiality is the finding that the acts alleged to have been committed were not of a type that would have led to physical injuries that would have been revealed by physical examination. This too is not an unreasonable determination. Kim Hilton testified that Petitioner held her by the back of her hair, and forced her head down so that she was looking at her feet while pulling her up the hill. She also testified that when they approached the barn, "we had to go really slow because there were briars all over the place and I was getting all these little - little things that attach to your clothes." (TR. at 24). She did not testify that any of her hair was pulled out, or that she was scratched by the briars. There was no testimony that she had been slapped, hit, or choked during this incident. No sexual intercourse took place, and the solitary

incident of vaginal penetration by Petitioner's fingers was, by both his testimony and that of Ms. Hilton, exceedingly brief. (TR. at 34, 345).

Given these determinations by the state court, which have not been shown to be either an unreasonable determination of the facts, or an unreasonable application of the law to the facts, it cannot be said that the medical records and photograph are of sufficient materiality that any non-disclosure raises a reasonable probability that a different result would have been obtained at trial.

As for Petitioner's claim of lack of due diligence by the prosecution, the court notes that Petitioner first presents this duty in state statutory terms imposed by N.C. GEN. STAT. § 15A-903(e) (1988). This court, of course, does not address violations of state criminal procedure unless it can be shown that the same conduct violated an independent federal right. As both Petitioner and Respondent have stated, Kyles established that "the

individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." 115 S. Ct. at 1567.

Given Judge Hobgood's findings, the question of materiality of the evidence at issue, has already been determined adversely to Petitioner. Furthermore, the court is persuaded by Respondent's argument that the medical records do not otherwise fall within the duty established by Kyles, since neither of the medial providers in question was "acting on the government's behalf in the case." While Petitioner argues that N.C. State University can be considered an arm of the State, it cannot be said that medical providers there were working on behalf of the prosecution in building its case. Indeed, it does not appear that the prosecutor was even aware that Ms. Hilton had been to the University infirmary. (TH., Vol. 1 at 224.)

Summary judgment is therefore appropriate as to Petitioner's claims of prosecutorial misconduct.

Ineffective Assistance of Counsel

In Strickland v. Washington, the Supreme Court established the standard for ineffective assistance of counsel entitling a criminal defendant to relief on a collateral attack on his conviction. Strickland sets forth a two-pronged test of both deficient performance and prejudice. 466 U.S. at 687; Lockhart v. Fretwell, 506 U.S. 364, 369 (1993); Hunt v. Nuth, 57 F.3d 1327, 1332 (4th Cir. 1995), cert. denied, 116 S. Ct. 724 (1996). Both prongs must be satisfied in order to find that a petitioner has received ineffective assistance.

To satisfy the prong of deficient performance, a petitioner must show that counsel made errors so serious that he was not functioning as the "counsel" guaranteed under the Sixth Amendment. Strickland, 466 U.S. at 687. The proper standard for attorney performance is that of "reasonably effective assistance," and a criminal defendant must show that his attorney's representation fell below an objective standard of

reasonableness. Id. at 687-88; see also Savino v. Murray, 82 F. 3d 594, 599 (4th Cir.)(competency is measured against what an objectively reasonable attorney would have done under the circumstances existing at the time of representation), cert. denied, 117 S. Ct. 1 (1996); Bell v. Evatt, 72 F.3d 421, 427 (4th Cir. 1995)(the Fourth Circuit defines effective assistance of counsel as that which is "within the range of competence demanded of attorneys in criminal cases," quoting Marzullo v. Maryland, 561 F.2d 540, 543 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978)), cert. denied, 116 S. Ct. 2533 (1996). A specific error or omission may be the focus of an ineffective assistance claim. United States v. Cronic, 466 U.S. 648, 657 n.20 (1984).

Strickland also emphasized that "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. at 689. Indeed, there is a strong presumption that counsel's performance falls within the "wide range of reasonable professional

assistance." Id. The mere fact that counsel pursued unsuccessful trial tactics, standing alone, will not rise to the level of ineffective assistance. Bell, 72 F.3d at 429.

To satisfy the prejudice prong, Petitioner must show that counsel's errors actually had an adverse effect on the defense. Strickland, 466 U.S. at 693. That is to say, "[t]he [Petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694; Bell, 72 F.3d at 427. This standard is, of course, the same test set out in Bagley for the failure to disclose favorable evidence.

As previously, Petitioner has challenged distinct aspects of his counsel's performance, as well as arguing that their cumulative effect denied him his Sixth Amendment right to effective counsel. At the evidentiary hearing, Petitioner sought

to support his claims of ineffective performance by expert testimony from attorneys Thomas F. Loflin of Durham and James Glover of Chapel Hill. The court now turns to the specific ineffective assistance claims.

Ineffective Discovery Request

Petitioner contends that the discovery request submitted to the prosecution "was minimalist in its approach, and given that blanks could be checked off, clearly was a generic form used by counsel's office in all sorts of cases. It did not specify the material that the defense should have sought, except in the most bare bones sort of way." (Petition at 48). Mr. Loflin testified that in his opinion, the discovery request did not meet the standards for the practice of criminal defense in the Raleigh-Durham area. Specifically, Mr. Loflin opined that the requests were framed in extremely broad language, including requests for information that tended to negate the guilt of the accused.

According to Mr. Loflin, the prosecution was required to disclose clearly exculpatory information, but a specific request would be needed for impeaching evidence. (TH., Vol. 1 at 35-36). Mr. Glover considered the discovery request to be "adequate," although he faulted counsel for failing to follow it with a motion to compel. (TH., Vol. 1 at 149). The prosecutor Frank Jackson, who had acted as both a prosecutor and criminal defense attorney, testified that he was familiar with the standards for diligence for attorneys in Wake County. He stated that the discovery request at issue here was more than the minimal request typical in criminal cases that he was involved in. (TH., Vol. 2 at 235).

Following the state hearing, Judge Hobgood found that "[t]he defendant has failed to prove that the Request for Discovery filed by the defendant's trial counsel failed to rise to the standard of practice or was in any way deficient, nor has the defendant proved that any material would have been provided

had a different Request for Discovery been filed." (Ex. 1 at 8). Judge Hobgood later concluded as a matter of law that the discovery request filed in Petitioner's criminal case did not constitute ineffective assistance of counsel. (Ex. 1 at 17).

In light of the applicable standard, neither of these findings can be said to involve either an unreasonable determination of the facts or an unreasonable application of law to the facts. Petitioner's own experts expressed different opinions as to the sufficiency of the discovery request; and the prosecutor, also an experienced attorney, testified that the request was within the range of competence for local counsel. At a minimum, Judge Hobgood's findings show that Petitioner fails to satisfy the performance prong of the Strickland analysis. Therefore, summary judgment is appropriate as to this claim.

Failure to Move to Compel Discovery

Petitioner contends that after Kim Hilton had testified on

cross-examination that she had seen medical providers at N.C. State University, counsel failed to move for disclosure of medical records during trial. Similarly, no motion to compel disclosure of medical records or photographs was filed prior to trial. Mr. Loflin testified that in his opinion, the failure to move to compel the production of medical records fell below the applicable standard of practice. In particular, he felt that in a case of this nature, a medical examination would have taken place, and that any statement that the victim had not sought medical care or counseling would be detrimental to the victim's credibility. (TH., Vol. 1 at 67-68). Similarly, the failure to request such information once it had been made known during cross-examination, also fell below the applicable standard. (TH., Vol. 1 at 70).

In contrast, Frank Jackson testified that he was not typically served with motions to compel in criminal cases. In fact, he stated that he had tried 30 felony cases in the previous

year and had not received a motion to compel during that time. Nor could he recall the last motion to compel that he had received. (TH., Vol. 1 at 236). George Anderson also testified on cross-examination that he does not regularly file motions to compel in criminal cases, and that he does not generally find it necessary to do so in Wake County. (TH., Vol. 1 at 265). He also acknowledged that Frank Jackson has an open file policy as long as he has known Mr. Jackson. (TH., Vol. 1 at 253).

Judge Hobgood found that:

> The defendant's trial counsel did not, at any time, file a motion for exculpatory material pursuant to Brady v. Maryland and United States v. Agurs.
>
> The defendant has failed to prove that the filing of a motion for exculpatory material pursuant to Brady v. Maryland and United States v. Agurs would have generated material that would have been of assistance to the defendant at trial.

(Ex. 1 at 8). Judge Hobgood also found as a matter of law that the failure to file a specific Brady motion did not constitute ineffective assistance of counsel.

This court has determined that the materials that would have been the subject of the motion to compel were not material for the purposes of a Brady analysis. Given this fact, Petitioner cannot establish the requisite prejudice needed to prevail on a claim of ineffectiveness for failing to file such a motion to compel. Summary judgment is therefore appropriate as to this claim.

Failure to Investigate and Failure to Call Witnesses

Petitioner has come forward with affidavits and testimony from a number of witnesses who were allegedly not discovered by Petitioner's trial counsel, but who have been located by new counsel. He refers the court to testimony from Gilbert Lee Moody and T. J. Russell, both former boyfriends of Kim Hilton, as well as a number of friends and former girlfriends of Petitioner. The testimony of Moody and Russell is to the effect that they know Kim Hilton to be an accomplished liar, that

she frequently engaged in acts of deception to conceal her activities from her mother. In his affidavit, Moody testifies that he knew that Kim hated to work at her mother's store. During the evidentiary hearing, he testified as to an incident in which he met Kim one evening and the two went off to have sex, despite the fact that Kim had a different boyfriend at the time. Moody further testified that Kim then wanted him to come with her to meet the boyfriend, and for Moody to say that he was her cousin. (TH., Vol. 1 at 202).

Petitioner has also submitted affidavits from Bambi Hampton and Jean Mitriscka Wilson stating that when Kim Hilton was in high school, she had problems with her mother. Both women testify that at one point, Virginia Hilton kicked Kim out of the house. Kim then stayed with Ms. Wilson's family. Ms. Wilson also testifies that Kim was flirtatious and would date men older than herself, and that her flirtatious behavior with Ms. Wilson's brother caused problems in that household.

A number of Petitioner's friends and former girlfriends have come forward to testify as to Petitioner's gentle nature towards women. Collectively, these affidavits portray Petitioner as considerate and gentle towards women, and as one who would not force women to engage in sexual acts. Indeed, several of the affidavits make the point that numerous women found Petitioner attractive and that he had no need to force someone to engage in sex.

Petitioner contends that trial counsel's failure to call witnesses who would have refuted Kim Wilson's testimony and called her credibility into question, and who would have bolstered his own testimony, constituted ineffective assistance. Petitioner also asserts that counsel was ineffective by failing to ask for prior statements of witnesses after they had testified, pursuant to N.C. GEN. STAT. § 15A-903(f). Finally, although Petitioner has withdrawn his claim that counsel failed to adequately prepare witnesses for cross-examination, he still

faults counsel for not calling "key defense witnesses like the health care providers named in the medical records." (Petition at 50).

Both of Petitioner's former attorneys testified at the evidentiary hearing. On cross-examination, George Anderson testified that an experienced private investigator, Charlie Beck, was hired to investigate Petitioner's case. (TH., Vol. 1 at 260). Beck located Billy Ray Prince, the passerby who helped Petitioner with his vehicle, and Robert Webb, the individual whose house Ms. Hilton came to after leaving the tobacco barn. (TH., Vol. 1 at 262). Beck was also instructed to check out businesses near the Star Flite to see if anyone had observed the incident and to try and locate witnesses familiar with the victim's background. He was also given a list of names of potential witnesses provided by Petitioner. (TH., Vol. 1 at 263).

Richard Rutherford testified that in addition to Beck's efforts, members of Petitioner's family assisted in attempting to

locate witnesses. He personally made numerous telephone calls in an attempt to locate witnesses. (TH., Vol. 2 at 64). Rutherford stated that despite efforts by both Beck and Petitioner's family, they were unable to come up with any negative information concerning Kim Hilton's background. (TH., Vol. 2 at 68). In addition, both he and Mr. Anderson had gone out to the area of the Star Flite in an effort to find witnesses, without success. (TH., Vol. 2 at 69). Mr. Rutherford also visited the tobacco barn and the surrounding area "a number of times." (TH., Vol. 2 at 70).

Mr. Rutherford was also questioned about his efforts to develop testimony concerning Petitioner's character towards women. He testified that Mr. Beck had spoken with Petitioner's live-in girlfriend at the time of the incidents in question. Mr. Rutherford also recalled speaking with Mr. Anderson concerning this issue and determining that it would not be "a fruitful line." (TH., Vol. 2 at 72).

At the evidentiary hearing, Petitioner introduced testimony of Ella Rogers and Angela Hanna, both of whom testified as to his character of gentleness towards women. The court notes that the prosecution attempted to impeach this testimony by asking them if they were aware that Petitioner had slashed the tires of his ex-wife's car; that he used to assault his ex-wife by pulling her hair; that he would go to his wife's house and tear the plants off the front porch; and that he attempted to force his live-in girlfriend to perform oral sex on him against her will. Furthermore, both of Petitioner's experts agreed that the introduction of such character evidence was subject to the risk that the prosecution could impeach with evidence of specific incidents of bad conduct. (TH., Vol. 1 at 113-15, 171). Finally, the court notes that Frank Jackson testified that during the previous year, he had not received any motions from defense counsel for prior statements of witnesses made at trial after the witness had testified. (TH., Vol. 1 at 236).

Judge Hobgood found that:

> Mr. Anderson and Mr. Rutherford initiated an investigation of the case, and to facilitate the investigation, engaged the services of an investigator, Charlie Beck, to locate witnesses for the defendant.
>
> During the course of the pretrial investigation, the defendant's investigator attempted to locate witnesses based on information given by the defendant to his attorneys. That investigation included an attempt to locate evidence of bad character on the part of the victim and of the defendant's good character.

(Ex. 1 at 8-9).

> Having heard the testimony of the defendant's witnesses who would testify as to his character for gentleness towards women, the court finds that this testimony is not such that the jury would have reached a different result had that evidence been adduced at trial.

(Ex. 1 at 10). Furthermore, Judge Hobgood concluded as a matter of law that:

> The investigation of the case by trial counsel for the purpose of locating, interviewing, and securing the attendance of witnesses for the defendant did not constitute ineffective assistance of counsel and did not violate his constitutional rights under the Sixth and Fourteenth

> Amendments of the United States Constitution and Article I, §§ 19 and 23 of the North Carolina Constitution.
>
> The defendant's trial counsel did not fail to interview witnesses who were known and available to determine the importance and usefulness of their testimony at trial, and counsel's conduct in that respect did not constitute ineffective assistance of counsel and did not violate the defendant's constitutional rights under the Sixth and Fourteenth Amendments of the United States Constitution and Article I, §§ 19 and 23 of the North Carolina Constitution.

(Ex. 1 at 14), and that:

> The failure of counsel to make a request or motion for the statements of the State's witnesses after those witnesses had testified did not constitute ineffective assistance of counsel, and did not violate his constitutional rights under the Sixth and Fourteenth Amendments of the United States Constitution and Article I, §§ 19 and 23 of the North Carolina Constitution.

(Ex. 1 at 17). The court finds that in light of the evidence produced at the state hearing, and Judge Hobgood's findings, Petitioner cannot prevail on this aspect of his ineffective assistance claim.

The court begins by noting that the Supreme Court in Strickland stated that:

> [C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

466 U.S. at 691. The Court specifically warned that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689.

The evidence shows that an investigation was done, that an experienced investigator was specifically retained, and that a number of avenues of investigative possibilities were pursued. That investigation did not yield any fruitful evidence concerning Ms. Hilton's character. The fact that Petitioner can now come

forward with former boyfriends who would testify that she is a pathological liar does not mean that trial counsel's original investigative efforts were constitutionally deficient.

The record here suggests that Petitioner's family has been pursuing this case literally for years after his conviction. It is therefore not surprising that new, or at least additional, evidence has come to light. Nevertheless, it must be remembered that trial counsel only had a limited amount of time to conduct pre-trial investigation and there were several areas that needed to be explored. It can be said of nearly any issue in any criminal case that further investigation would always be possible. Nevertheless, decisions have to be made concerning the allocation of investigative resources during the pre-trial period, and such decisions by counsel are entitled to a strong measure of deference by the court on habeas review. In light of these considerations, Judge Hobgood's findings as to counsel's effectiveness dealing with pre-trial investigation are not

unreasonable. Petitioner therefore fails to satisfy the performance prong of Strickland.

Turning to Petitioner's claim that counsel was ineffective for failing to obtain prior statements of witnesses after their testimony, Judge Hobgood's findings on this point are also not clearly unreasonable. Frank Jackson testified that despite trying 30 major felony jury trials in the previous year, he had not received such a motion in any case. Thus, Judge Hobgood could therefore have reasonably determined that any failure to make such a motion in Petitioner's case also did not violate Strickland's performance prong.

As for the failure to develop testimony concerning Petitioner's character of gentleness towards women, the evidence shows that this was a strategic choice on the part of Petitioner's trial counsel. Given the manner in which the prosecution would evidently have been able to challenge such testimony, such a decision was well within the range of competent attorney

performance and does not satisfy the first prong of Strickland.

Finally, the court finds that Petitioner's contention that counsel was ineffective for failing to call health care providers to impeach Ms. Hilton's credibility is simply a variant of his claim that counsel was ineffective in conducting discovery to locate medical records. Obviously, if counsel has not learned of such medical records, he cannot learn the identity of the medical providers in order to call them as witnesses.

Beyond this, however, the court finds that any claim that testimony from such medical providers would have served to impeach Ms. Hilton is largely speculative. Aside from counsel's inferences from the medical entries, no evidence has been introduced that the actual testimony of such doctors and nurses would actually have impeachment value. No such persons were called as witnesses at the hearing, and no affidavits have been submitted from such persons. Since Petitioner did not develop this evidence in the state hearing, he may not now do so in this

federal proceeding. 28 U.S.C. § 2254(e)(2). Absent such testimony, and in light of the fact that the non-disclosure of the reports themselves did not give rise to a reasonable probability of a different outcome, Petitioner cannot establish any prejudice from the failure to call such witnesses.

Summary judgment is therefore appropriate as to these claims.

Allowing Petitioner to Admit to the Conviction of a Crime Which Did Not Occur

At the conclusion of cross-examination, Petitioner was asked what he had been convicted of. He responded, "Traffic. Speeding, driving with revoked license, destruction of private property, and communicating a threat." (TR. at 478). Petitioner contends that although he was charged with communicating a threat, this charge had actually been dismissed. Petitioner asserts that both the charges of communicating a threat and injury to

personal property arose out of an incident with his ex-wife. He now contends that his trial counsel was ineffective for failing to investigate his criminal record and adequately prepare him for testimony, resulting in his admitting to a crime of which he was not actually convicted.

At the evidentiary hearing, George Anderson testified on direct examination that he was "sure" that there had been a discussion with Petitioner of his record, but that he had no specific recollection concerning investigation of the court files concerning Petitioner's prior convictions. Petitioner did introduce a copy of the dismissal of the charge of communicating threats in Wake County. (TH., Vol. 1 at 254-55). Petitioner offered no testimony at the evidentiary hearing. The exhibits contain a seven-page affidavit from Petitioner, prepared in 1993, in support of his motion for appropriate relief. The court notes that while Petitioner offers general complaints of the breakdown in communication between himself and Mr. Anderson, he makes

no reference to any failure to discuss his prior criminal record.

Judge Hobgood found that:

> Before trial, defense counsel consulted extensively with the defendant to prepare him for his trial testimony, and counsel did discuss the defendant's criminal record with him.
>
> During his trial testimony, the defendant testified that he had been convicted of communicating threats and damage to property as well as traffic offenses.
>
> The defendant was charged with the offense of damage to property in Wake County in 1987 that was dismissed, but he has failed to prove that he was not convicted of that offense in another location.

(Ex. 1 at 9-10). Judge Hobgood also concluded, as a matter of law, that trial counsel's investigation into Petitioner's criminal record for the purpose of preparing him to testify did not constitute ineffective assistance of counsel. (Ex. 1 at 17).

As Respondent has noted, it was Petitioner's burden to establish the elements of his claim of ineffective assistance of counsel at the evidentiary hearing. No evidence was introduced

concerning the amount of preparation and coaching that was, or was not, done concerning Petitioner's criminal record, apart from Anderson's testimony that he was "sure" it was done, but he had no recollection of the specifics. Furthermore, Respondent also notes that Petitioner's own expert characterized both the charges of communicating threats and injury to property as "insignificant" and testified that such convictions would not be "that significant an issue." (TH., Vol. 1 at 184).

Under these circumstances, it cannot be said that Judge Hobgood's conclusion that Petitioner did not receive ineffective assistance with regard to this claim is unreasonable, and summary judgment is therefore appropriate.

Ineffective Assistance on Appeal

Petitioner contends that while his direct appeal was pending before the North Carolina Court of Appeals, a new investigator observed a statement from Shannon Simmons

(Brown) in the file of one of the investigating detectives. From the record, it can be ascertained that this statement contained information that Kim Hilton was irresponsible and had been kicked out of her mother's house. According to Petitioner, this statement led to other witnesses, which in turn led to the discovery of Moody and Russell. Instead of taking the time to investigate and follow up the information contained in this statement, Petitioner faults his attorney for "reflexively" filing a motion for appropriate relief in the Court of Appeals.

The decision of the Court of Appeals shows that this motion was premised both on Brady grounds, and as newly-discovered evidence under N.C. GEN. STAT. § 15A-1415(3) and (6). The Court of Appeals noted that, while Petitioner argued that the statement of Mrs. Brown would show that Kim Hilton was irresponsible and therefore would have left the Star Flite premises, the statement was not internally consistent. According to the court, Mrs. Brown also told the detectives that

Kim "cared about her work," that she knew of no problems that Kim had at work, and that "it isn't like Kim to just leave the store" open. State v. Coats, 100 N.C. App. at 464, 397 S.E.2d at 518. The Court of Appeals concluded that the statement of Mrs. Brown was neither material for Brady purposes (Petitioner's expert conceded the point)(TH., Vol. 1 at 38), nor did it meet the standards for newly-discovered evidence under § 15A-1415(6). Id.

Richard Rutherford testified that he interviewed Mrs. Brown and determined that she would not have been a good witness for Petitioner. For one thing, much of her testimony would have corroborated Kim Hilton's version of the facts following her return home, including her confiding in Mrs. Brown that she did know her abductor and that she was frightened of him, as well as Mrs. Brown telling her that she "had to tell the truth." In addition, Mrs. Brown had received a letter from Petitioner which had disturbed and frightened her.

Petitioner admitted writing the letter and told his attorney that he was "upset at her lies." (TH., Vol. 2 at 63). Judge Hobgood found that Petitioner failed to prove that had any additional investigation been done prior to filing the motion for appropriate relief, any additional evidence could reasonably have been discovered. (Ex. 1 at 11). He also concluded, as a matter of law, that counsel's investigation of a claim of newly-discovered evidence prior to filing the motion for appropriate relief did not constitute ineffective assistance of counsel. (Ex. 1 at 17).

The record reflects that counsel did investigate the statement of Mrs. Brown. Petitioner obviously contends that he should have done more before filing a motion for appropriate relief, and that further investigation would have revealed the witnesses that he now relies on to call Kim Hilton's credibility into question. Nevertheless, such a contention is based exclusively on hindsight. Given the strong deference that is afforded counsel's choices in such matters, it cannot be said that

the decision to file the motion for appropriate relief was outside the range of competence of counsel. Certainly Judge Hobgood's legal conclusion was not unreasonable under the applicable standards. Finally, since none of Petitioner's individual claims of ineffective assistance have been found to warrant relief, it cannot be said that any different result should obtain when these claims are considered as a whole. Summary judgment is therefore appropriate for these claims.

Newly-Discovered Evidence

Petitioner claims that he is entitled to habeas relief based on the existence of three types of newly-discovered evidence: the testimony of Don Phillips, the medical records and photograph of Kim Hilton's knees, and evidence that Kim Hilton had long engaged in a pattern of deceptive conduct. The alleged significance of the photograph and medical records, as well as the testimony from Kim Hilton's former boyfriends concerning

her past deceptive behavior, has already been discussed.

Mr. Phillips testified at the evidentiary hearing. He was a friend of Petitioner's, and had been the best man at Petitioner's wedding, although the two had had a falling out several months prior to the incident of November 5. Phillips testified that he visited Petitioner in prison, and that Petitioner gave him an envelope that explained the circumstances of his alleged crime.

According to Phillips, after reading this explanation, he came to realize that he had witnessed Petitioner and Kim Hilton leaving the Star Flite as he was sitting in a Burger King in view of the store. Phillips stated that he was waiting for Linwood Piper, the owner of Piper's Paint and Body Shop, to arrive at his place of business. As he waited, he saw Petitioner and a "blond-headed lady" come out of the store and get into the truck. (TH., Vol. 1 at 15-16). He testified that the woman walked out behind Petitioner, that she was not dragged, that after she got in the truck, she and Petitioner talked for a few seconds before he

entered the truck and they left, and that he did not see a gun in Petitioner's hand.

It was revealed during the cross-examination of Richard Rutherford that while in prison, Petitioner had corresponded with the woman who was his live-in girlfriend at the time of the November 5 incident. In one of these letters he had stated something to the effect that, "Do you think that someone we know will be willing to testify that they saw Kim and I, us, leaving the store and I wasn't forcing her? If you can, I'll try to make it worth their while." In other correspondence, the girlfriend had written him back stating, "I want you to know that I still have plenty of letters that you have written me in the past, even the ones that you wanted me to find somebody to lie for you over the deal with Kim. Remember? I'm sure the letters wouldn't do you any good, and if an appeal ever comes your way, so I'd suggest you butt out of my life and business." (TH., Vol. 2 at 76-77).

Judge Hobgood found that:

> At some point before the trial, the defendant had requested that the woman with whom he had been living locate one of their friends to testify that he had seen the victim leave the station with the victim [sic] voluntarily, and that the defendant could make it worth their while.
>
> The testimony of Phillips is not new evidence.
>
> The testimony of Phillips is not probably true.

(Ex. 1. at 12). Judge Hobgood also found that Petitioner had failed to prove that the testimony of Gilbert Moody was probably true. (Ex. 1 at 13).

The court agrees with Respondent's position that this claim of "newly-discovered evidence" is actually a free-standing claim of actual innocence, based on newly-discovered evidence, of the type set forth in Herrara v. Collins, 506 U.S. 390 (1993). As Chief Justice Rehnquist, writing for the Court, stated, "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation

occurring in the underlying state criminal proceeding." 506 U.S. at 400. Although a number of Justices assumed, for the purposes of argument, that in a capital case "a truly persuasive demonstration" of actual innocence would render an execution unconstitutional, such a showing would have to satisfy an extremely high threshold. Id. at 417; id. at 429 (White, J. concurring)(petitioner would be required to show that no rational trier of fact could find proof of guilt beyond a reasonable doubt).

Assuming arguendo that a freestanding claim of actual innocence would justify habeas relief in the non-capital context, it is clear that Petitioner fails to meet the high standard of proof that would be required. In this regard, Judge Hobgood's determination as to the lack of credibility of the testimony of both Phillips and Moody is fatal to such a claim. Even aside from the deferential standard of review imposed by the AEDPA, it is fundamental that Judge Hobgood was in a position to listen to these witnesses, observe their demeanor, and assess their

credibility. Similarly, his finding that the medical records substantially corroborated Kim Hilton's testimony shows that this evidence would also preclude Petitioner from being able to satisfy such a high burden of proof. Summary judgment is therefore appropriate at to this group of claims.

Conclusion

It is therefore recommended that Respondent's motion for summary judgment be GRANTED.

June 6, 1997.

WALLACE W. DIXON
UNITED STATES MAGISTRATE JUDGE